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ABSTRACT

This guide to student disciplinary hearings provides an understanding of procedures and options during the student suspension or expulsion process through the perspectives of the different participants. Section 1, "Why Hearings?" discusses due process and the three categories of student disciplinary hearings: pre-suspension, suspension, and expulsion. Section 2 analyzes the roles and responsibilities of hearing participants, including the board of education, hearing officers and board committees, administrators, attorneys, and witnesses. Section 3, "Organizing the Expulsion Hearing," reviews how the hearing is scheduled and includes a sample notice of hearing. The section presents documents involved and an explanation of possible seating arrangements and methods of recording and hearing. Section 4, "Conducting the Hearing," describes setting the tone of the hearing and formal and informal procedures. The section provides an overview of the order of events: the case for expulsion, swearing witnesses, the student's side, closing statements, deliberation and decision, formal action, and decision and notification. A sample notice of expulsion is included. Section 5 discusses related questions concerning rules of evidence, witnesses, contraband, and open versus closed meetings. A summary of pertinent case law is appended. (CJH)

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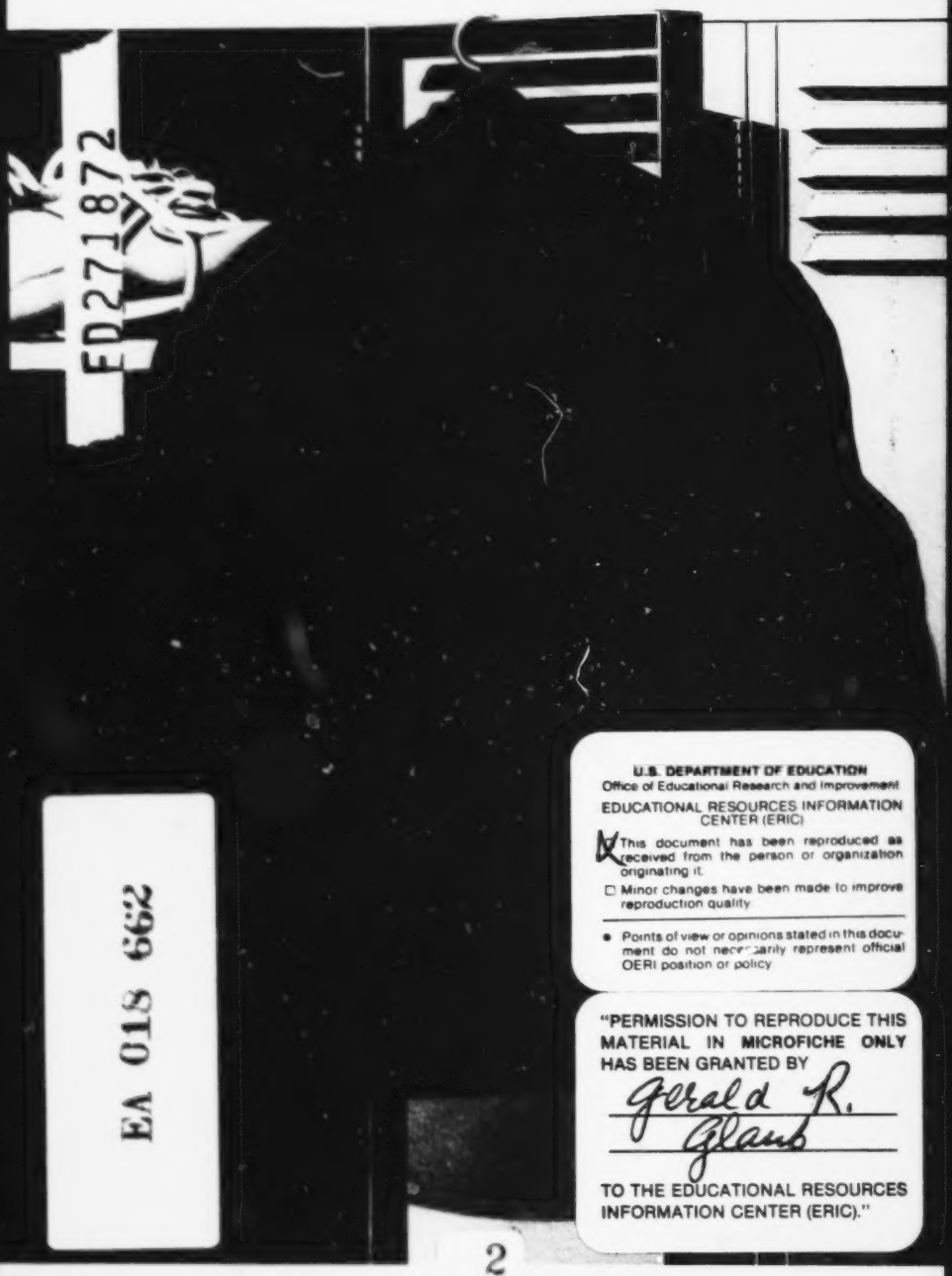

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Gene J. Cartwright • Allen D. Schwartz

The School Official's Guide to

Student Disciplinary Hearings

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Contents

5 **Forword**

1/Why hearings?

7 Due process
7 Three kinds of hearings
9 Suspension hearings
9 Expulsion hearings
10 The expulsion law in Illinois

2/Roles and responsibilities

11 Policies and rules
12 The board of education

Bifurcated hearings • *Decision and formal action* • *Written decision*

14 Hearing officers and board committees
15 The administrator

Special education review • *Administrative procedures*

16 The attorney
17 Witnesses

3/Organizing the expulsion hearing

19 The time
19 The place
19 Advance notice
20 Sample notice of hearing
21 Essential documents
22 The hearing room
24 Some typical hearing room arrangements
28 Recording the hearing

4/Conducting the hearing

29 Setting the tone

continued

29 Formal v. informal procedures
31 The order of events — an overview
31 Opening the hearing
34 Presenting the case for expulsion

For the record • *Stating the charges* • *The student's past record*

36 Presenting and swearing witnesses
37 Hearing the student's side

Challenging the allegations • *No defense* • *Request for dismissal*

39 Closing statements
40 Deliberation and decision

The two-part hearing • *The hearing officer*

42 Formal action
43 Decision and notification
43 Sample notice of expulsion
44 The official record

5/Some related questions

45 Rules of evidence
45 Student witnesses
45 Self-incrimination
46 Contraband
46 Open v. closed meeting

48 **Appendix — Some pertinent case law**

Foreword

School officials in Illinois and across the nation owe a debt of thanks to Gene J. Cartwright and Allen D. Schwartz. As they point out in Chapter 2, suspending or expelling a student is an unpleasant responsibility at best. By collaborating on this practitioner's guide, they have cleared away the mystery surrounding disciplinary hearings and at least made the task a little less intimidating.

Moreover, Cartwright and Schwartz have filled a glaring void in the literature for school boards and school administrators. Much has been written about the statutory and constitutional rights of public school students, of course, but little of a practical nature is available to guide local school officials as they attempt to address those rights on a day-to-day basis. Literature addressing the practical aspects of student disciplinary hearings is particularly lacking.

One of the biggest obstacles to fairness in any school-related hearing is the potential for confusing roles among various administrators and the school board. Statutes in some states, including Illinois, contribute to this confusion. Thus, school boards that are required to function as impartial hearing bodies are sometimes encouraged to take on adversarial or investigatory functions. By the same token, district superintendents who must function as the "prosecutors" in student expulsion hearings are treated as official advisers to their hearing boards, which are supposed to remain impartial. It may be impossible to avoid all of these role conflicts in some situations, but this practical guide will at least make the parties aware of the potential conflicts and the steps necessary to ensure a fair hearing for the student.

A major accomplishment of this book is the way in which it views the due process hearing from the perspectives of the different participants — the student, the hearing board or hearing officer, and the administrators who are recommending disciplinary action. Knowledge of how to keep these roles

separate throughout the hearing, deliberation, and voting process should enable school officials to proceed with confidence.

As the authors demonstrate here, there is no one correct way to conduct a student disciplinary hearing. The degree of formality called for varies with the severity of the proposed punishment, the nature of the al'eged misconduct, and the extent of the student's defense. Moreover, although every hearing must meet certain standards of fair play, those standards are not cast in the concrete of state statutes in most jurisdictions. Rather, they are deduced from court decisions and are frequently re-interpreted by new court decisions.

This book will provide an understanding of hearing procedures and options, but no book can evaluate every situation that might arise or anticipate future court rulings. It should not be treated as a substitute for legal counsel.

Finally, readers in states other than Illinois must keep in mind that disciplinary statutes vary from state to state. The basic concepts of due process as imposed by federal courts apply equally to all, but different states may provide different statutory mandates. Thus, it is essential to become familiar with the law in your own state.

Harold P. Seamon
Executive Director
Illinois Association of School Boards

June, 1986

1/Why hearings?

Due process

The U.S. Constitution extends certain rights to all citizens. Some of these rights are substantive, some are procedural.

Substantive rights are the basic rights guaranteed by the Constitution, such as free speech, protection from unreasonable search and seizure, and the right against self-incrimination. Federal courts have held that the right to attend a public school is a substantive right.

Procedural rights are those guaranteed by the "due process" clauses of the Constitution. Due process provides that substantive rights may not be taken from a person without following certain procedures. Federal courts have held that public school students have certain *procedural* rights that must be accommodated whenever their *substantive* right to an education is in jeopardy.

In other words, if school officials intend to deprive a student of a substantive right (the right to attend school), then the student must be granted certain procedural rights. These procedural rights include an informal meeting with the disciplinarian in which the reasons for the proposed disciplinary action are explained and the student given the right to respond. They usually include the right to a hearing before the school board, and sometimes include the right to a review by a court of law.

Three kinds of hearings

Student disciplinary hearings fall into three categories:

• **Pre-suspension hearing.** Prior to the imposition of discipline, students must be advised of the charges and evidence against them and be given an opportunity to respond. (An exception is where immediate removal is necessary

because the student poses an immediate threat to students or staff.) Although this is an informal procedure conducted by the school disciplinarian, the pre-suspension hearing is very important. Failure to provide this hearing invalidates the entire disciplinary process.

• **Suspension hearing.** Suspension means removal from school for a limited time (10 days is the maximum suspension in Illinois). In Illinois and most other states, certain school employees (including the superintendent and principal) may be authorized to suspend students from school. The courts and most state laws do not require a formal hearing unless parents ask to have the suspension reviewed by the school board. In reviewing a suspension, the board would either uphold the suspension, shorten it, or reverse it and (presumably) expunge it from the student's records.

• **Expulsion hearing.** Expulsion means removal from school for a substantial length of time. (In Illinois, a student may be expelled for the remainder of the current school term.) Only the school board may expel. At the expulsion hearing, the administrator functions as the "prosecutor" and the school board functions as the "jury." Based on the evidence, the school board determines whether the student is guilty of the charges and, if guilty, whether the misconduct merits expulsion.

A student may not be expelled until the school board acts. In most situations, the student is suspended pending an expulsion hearing — in which case, the expulsion hearing also serves as a suspension review hearing. If the school board decides not to expel the student, it also may decide to reverse the suspension and expunge the student's record.

Questions also arise as to whether hearings or other procedures are called for in other disciplinary situations. That is, what due process rights should be extended to a pupil prior to corporal punishment, keeping a pupil after school, or having a pupil wash the chalkboard?

Is the student entitled to a hearing when school officials withhold extra-curricular privileges — such as a field trip or class trip? The answer to most such questions is, no. However, each situation should be evaluated on its own merits, preferably with the aid of legal counsel.

In some situations, school officials may offer "fair play" even where they believe no substantive right is involved. There is nothing wrong with providing an informal process, including an informal hearing. However, if a hearing is convened, it should be conducted properly. A mishandled hearing can provide the student with a basis for claiming that his rights were violated — even though no hearing was originally required.

Suspension hearings

Most student suspension cases never reach a review hearing. Following the informal hearing given by the school administrator prior to suspending a student (which must be given), Illinois law requires that written notice be sent to the student's parents or guardians. The notice must state the reasons for the suspension and the duration. It also must state that upon request of a parent or guardian, the school board will review the suspension.

If a review is requested, the school board or a hearing officer must meet with the parent or guardian and the pupil to discuss the suspension. (The statutory term, "discussion," has been interpreted to mean a hearing.) The hearing must be carried out in a manner similar to an expulsion hearing. The board may then uphold the suspension, shorten the suspension, or overturn the suspension and expunge the student's record.

If the board elects to have a hearing officer meet with the student and parents, the hearing officer must conduct the hearing in the same manner as an expulsion hearing and present the board with a written report. The board must base its action on the hearing officer's report.

Expulsion hearings

An expulsion hearing should be treated as a rather formal procedure. Although the hearing need not meet the standards of a courtroom trial, there are some similarities. The student must be allowed to have legal representation and to present a defense against expulsion by presenting evidence and cross-examining witnesses. The school board, in its role

as a jury hearing the evidence, must not confuse its role with that of the administrator who is making the case for expulsion.

As with a hearing to review a student suspension, the school board may employ a hearing officer to conduct the expulsion hearing. The hearing officer must present the board with a written summary of the arguments for and against expulsion, and the school board makes its decision based on that summary.

The expulsion law in Illinois

Illinois school boards and administrators run a serious risk of misconstruing student expulsion procedures if they read Section 10-22.6 of *The School Code* as stating all of the applicable law. It does not. Although the statute does not contradict standards for due process enunciated by the U.S. Supreme Court, it presents some broad terminology that must be read with constitutional case law standards in mind.

Section 10-22.6, for example, refers to the expulsion hearing as an opportunity for parents to "discuss their child's behavior." Yet, the due process standards established by the U.S. Supreme Court call for procedures that exceed a simple "discussion." Moreover, the Illinois statute provides no insights into the different roles that must be played by the school board and the administrator. Nor is it completely clear as to the function of the school board hearing officer.

Consequently, it is possible for school officials to err in establishing expulsion procedures based only on the apparent meaning of Section 10-22.6. For instance, the roles of the administrator and the hearing officer can easily be confused, imposing on the latter the investigative and administrative functions that rightfully belong with the former. In fact, the hearing officer must provide the same kind of impartial hearing that the board of education would provide if it were hearing the case directly. This is not completely clear in *The School Code*, but must be inferred by applying standards set forth in various U.S. Supreme Court decisions.

2/Roles and responsibilities

Policies and rules

Expelling a student from school for the remainder of a semester or school year is never a pleasant event for anyone involved. School board members and administrators, perhaps more than most people, can appreciate the seriousness of depriving a student of an education. Many school districts, in fact, go to great lengths to provide disruptive students with alternative programs in lieu of expulsion, usually in more restrictive settings.

School district expulsion policies that protect the rights of students must provide:

- Adequate administrative procedures leading up to the decision to recommend expulsion;
- Timely and informative notice to the parents and the student, indicating what the administration is recommending and why, and setting forth their right to contest that recomendation;
- A fair hearing and an impartial decision by the board of education.

Courts consistently hold that a rule must exist before it can be broken and that a student must be made aware of the rule before he can be punished for breaking it. Thus, it is essential for the school board to adopt policies and enact rules of student conduct. The rules of conduct and the consequences of violations must be communicated to students before discipline can be enforced. (Note: An exception to the requirement that there be a rule of conduct is where the conduct is so grossly disobedient or abhorrent that no rule is necessary.)

Once rules and consequences are developed and published, the roles of the school board and administrator diverge. Stated briefly, the role of the administrator is to enforce the rules; the role of the board is to review that enforcement.

The board of education

Because its primary functions are to set policy and monitor its execution, the school board is largely a legislative body. In its legislative capacity, the board enacts policies regulating all aspects of school operations, including student conduct.

However, when a student is recommended for expulsion —or when a student decides to contest a suspension — the school board must shift from its legislative role to a judicial role. The board serves as "judge and jury" in weighing the evidence and deciding whether a student shall be removed from school.

The decision to expel a student can be made only by formal, public vote of the school board following a hearing. To ensure that the board represents an impartial decision-making body, it is essential that:

- Members of the board should not be involved in investigatory activities or preliminary discussions leading up to the expulsion recommendation.
- The student must be allowed to dispute evidence and confront witnesses presented by the administration.
- The hearing must be conducted in a manner that does not violate the student's right to due process.

Although the student must be allowed to have legal counsel and to present evidence, both federal and state courts have consistently held that a student expulsion hearing need not take the form of a judicial trial. Moreover, although there may be exceptions, rules of evidence don't usually apply. Where issues regarding the conduct of the hearing or the admissibility of evidence arise, the individual presiding must be able to deal with them. Many boards employ an attorney to guide them through hearings.

Bifurcated hearings — Sometimes an expulsion hearing presents the school board with not one, but two decisions:

- Is the student guilty of the alleged wrongdoing?
- If the student is guilty, is expulsion appropriate?

A question arises as to whether the expulsion hearing

must be handled in two parts, or bifurcated. That is, must the board first hear evidence regarding the issue of guilt and then deal with the issue of punishment? Most courts feel it is not necessary to separate proceedings in this way. However, most courts also agree that the board should be careful not to let a student's record of prior wrongdoings prejudice its determination as to guilt or innocence.

There may be situations where the board might want to make a decision on guilt before listening to arguments regarding the punishment. To date, however, no court has required a bifurcated hearing in an expulsion case. School boards typically hear all of the evidence regarding both guilt and punishment before deliberating and voting. It is during their deliberations that they should strive to consider guilt first and punishment second.

In the majority of expulsion cases, guilt is not a serious issue. Administrators rarely recommend expulsion until or unless it is clearly established that the student actually committed the wrongdoing. Evidence that the student did commit the act must be presented to the board, of course, and entered into the record.

Most student disciplinary actions are contested on the issue of appropriateness or extenuating circumstances. That is, the student and parents and their attorney are more likely to argue that (a) the school rule calling for expulsion is too severe or (b) there were mitigating circumstances that warrant a less severe punishment.

Decision and formal action — The student or his attorney must be given an opportunity to present evidence, including their own witnesses, and to cross-examine witnesses presented by the administration. Both sides also should be allowed to make closing statements if they wish. Following closing statements, the board should have heard all the evidence there is to hear.

At that point, the board should retire to executive session to deliberate. Where the superintendent is making the case for expulsion, it would seem appropriate to exclude the superintendent from the board's deliberations as to guilt or innocence. The board could then properly seek the superintendent's advice as to the extent of discipline to be imposed.

In executive session, board members discuss the issues and evidence among themselves and attempt to arrive at a consensus as to whether the student is guilty of the alleged violations and then whether the student (if guilty) should be expelled or otherwise disciplined. In determining guilt or innocence, board members should not be influenced by the student's past record. Past record, however, may be important in finally determining whether to expel and, if so, for how long.

The school board's final step is to convene in a public session and formally vote on a motion or resolution to expel, if expulsion is the consensus arrived at in executive session. Naturally, the student and parents should be notified as to the board's action by written notice of the final decision.

Written decision — School boards are not required to produce written decisions in expulsion or suspension proceedings, nor should they do so. Hearings may be recorded by court reporter or tape recording, but recording is not required. The student should be allowed to record the proceedings, in which case the school board should arrange for its own recording.

Hearing officers and board committees

In Illinois, *The School Code* authorizes school boards to use hearing officers to conduct student disciplinary hearings. The hearing officer may be an attorney or school employee. A committee of the board may also function in the same capacity as a hearing officer. The key point is that the hearing officer or committee must function as a "stand in" for the school board.

The hearing officer or committee must conduct the expulsion hearing in essentially the same fashion as the school board would. The difference is that the hearing officer or committee cannot and should not substitute its judgment for the judgment of the full board. Only the full board can expel. The board takes action based on a written summary of the evidence. The hearing officer or committee must prepare a clear and unbiased summary of the evidence. An inaccurate or biased presentation of the evidence is a target for litigation.

Thus, the hearing officer's report to the board should provide the full flavor of the evidence. Although the report probably should not draw conclusions or make a recommendation one way or the other, the hearing officer should offer observations regarding the evidence. For example, the board should know what evidence came from eye witnesses and what is based on hearsay or second-hand information.

When the board convenes to consider the hearing officer's written summary, it should not call upon the hearing officer for additional comments or clarification. To do so would invite arguments in the case and an unconscious attempt to influence the school board. The hearing officer's role is not adversarial or advocacy — it is fact finding. If the hearing officer's report falls short, then a full board hearing should be convened to cover the points that are unclear in the report, or the report should be sent back to the hearing officer to re-convene the hearing to cover these points.

After deliberating on the hearing officer's report in executive session, the board would convene in public session to take action — the same as it would if the board itself had conducted the hearing.

The most obvious advantage of using a hearing officer or committee is that it saves time for board members. This is especially important in large school districts where expulsion cases might be rather numerous. A less obvious advantage is that it enables the full board to fully consider evidence regarding guilt before it addresses the appropriateness of expulsion and the student's past record.

The administrator

The administrator responsible for student disciplinary actions varies among districts. Typically, it is the principal or dean of students who handles discipline. The recommendation for expulsion is directed to the school board through the superintendent.

Naturally, the administrator should bring expulsion recommendations before the board only after a thorough investigation of the facts and analysis of the evidence in relation to the district's rules of student conduct. Some districts use an administrative panel to evaluate each case and to advise

or direct the disciplinarian on how to proceed.

Special education review — It also is essential to determine whether the student's conduct is related to a handicapping condition. A special education student cannot be expelled unless the disciplinarian can show that the conduct or violation is not related to the student's disability. If the improper conduct is so related, the student may not be expelled. Instead, the student's educational program must be restructured to meet his or her needs.

A potentially serious problem is created by the regular student who has a special education need that is not recognized until the improper conduct occurs. If there is any hint that this may be the case, the student's possible need for special education should be investigated before expulsion is recommended. An expulsion is not valid if it is later determined to be for a special-education related problem.

Administrative procedures also must include arrangements for the disciplinary hearing, including such tasks as:

- setting the time and place;
- notifying participants;
- making physical arrangements;
- preparing necessary documents.

The attorney

Every school district should obtain legal advice in developing student discipline policies and in working out disciplinary hearing procedures. Once procedures are standardized in conformance with the law, some school boards will want an attorney on hand for complicated hearings to help with rulings on particular issues, such as the admissibility of evidence. Experienced hearing officers or school administrators can guide school boards through most routine hearings, with the attorney consulted only as needed.

The school administration also may need legal counsel from time to time in difficult cases. In particular, the administration should consider using an attorney to present its case at any expulsion hearing where the student is represented by an attorney.

In a seriously disputed case where both the student and

administration have employed attorneys, the school board also should consider using an attorney (other than the administration's attorney) to act as a referee or order keeper. This attorney would rule on objections to the evidence raised by either side. The student's attorney, for example, might complain that testimony based on what the principal was told by a third person should be dismissed as "hearsay." Or the attorney might object to the introduction of a document that does not appear to be an official school record. Or he might object to some aspect of the hearing procedure.

The attorney for the school administration might similarly object to the evidence presented by the student's attorney.

Where the hearing is being conducted by an experienced hearing officer, he or she may be able to serve as the neutral referee and preserve an atmosphere of fairness by ruling on such objections. Where the presiding officer is not experienced, however, the atmosphere of fairness may depend upon a neutral attorney employed to rule on objections. Without this referee, the presiding officer may be tempted to ask the administration's attorney for advice on how to rule on objections raised by the student's attorney.

Witnesses

The attorneys or other representatives of the administration and the student should be invited to make opening statements and closing statements. Other than that, all evidence is presented by sworn witnesses or through documents. The board of education does not have subpoena power. Even the student whose expulsion is sought cannot be forced to attend the hearing. Nor can the student's parents be required to attend. (Refusal of the student and parents to take part in the hearing after proper notice effectively waives their right to contest the expulsion, of course.)

Each witness in a formal hearing should be sworn on oath to tell the truth by either the hearing officer, court reporter, or board president. (The oath is not necessary in an informal hearing.)

The first witness usually is the administrator who is recommending expulsion. His or her task is to lay out the case

for expulsion, explaining which school rules have been broken, citing the evidence that the student committed the alleged misdeeds, and explaining why expulsion is the appropriate remedy. The administrator seeking a student expulsion also will advisably present other witnesses and evidence. Other witnesses could include:

- Individuals who saw the student commit the alleged misconduct;
- Other individuals who took part in the investigation of the misconduct.

Also, if an issue is raised as to whether the student's conduct is special-education related, witnesses would include educational specialists who took part in evaluating the student and can vouch that his conduct is not related to a handicapping condition.

Most school officials agree that students generally should not be called by the administration as witnesses at an expulsion or suspension hearing. School life can become difficult for students who side with the administration against another student. An exception might be where crucial evidence presented by an adult witness must be confirmed by a student. Another factor might be whether the student is mature enough to handle peer pressures after the hearing.

Obviously, there is no set number of witnesses that the administration should present to support its case for expulsion. There is some strength in sheer numbers, but balancing of numbers is not conclusive. Eye-witnesses — individuals who actually saw an event take place — are particularly important.

3/Organizing the expulsion hearing

The time

A student disciplinary hearing must be scheduled at a time that is convenient for every one. For hearings before the board of education, this means picking a time of day when board members can be present. Time also should be convenient for the student and the student's parents, but claims of inconvenience that are not bonafide should not be allowed to serve as a delaying tactic. Postponements should be granted, but only for good reasons.

The place

Primary criteria for the scene of an expulsion hearing are privacy and adequate space. The school board meeting room may be appropriate. So might any other large conference room. Because they offer inadequate privacy, a cafeteria or an auditorium would not be appropriate.

Advance notice

Illinois law requires that parents receive advance notice of an expulsion hearing. The notice must be sent by certified or registered mail. It must state the time, place and purpose of the meeting, and inform the parents of the student's right to be represented. It's also recommended that a copy of the notice be sent to the parents by regular mail as a precaution against registered or certified mail being refused or otherwise not received. A copy should be sent to the student who is no longer a minor to avoid a student claim of parental conflict of interest.

The law does not specify how far in advance parents must be notified. Seven days before the hearing is probably adequate time, keeping in mind that the parents may want to obtain legal counsel and prepare a defense.

Sample notice of hearing

(*date*)

Dear (*parents*):

This letter is to notify you that the administration of School District (*number*), (*complete address*), (*county*) is recommending the expulsion of your son (*or daughter*), (*name of student*), from school because of gross disobedience and/or gross misconduct. If approved by the Board of Education of District (*number*), the expulsion will be effective from (*date*) until (*date*). The specific charges giving rise to the expulsion recommendation are as follows:

> (*Describe the date, time, place and nature of the behavior or incident(s) giving rise to the expulsion recommendation, and cite the rule violated or the appropriate section of the district's discipline code.*)

As the parent (*or legal guardian*) of (*student's name*), you are hereby requested to appear with (*student's name*) at a hearing before the Board of Education of District (*number*) (*or a hearing officer representing the Board of Education*) to hear information and evidence regarding these charges. The hearing will convene at (*time*), on (*date*), at (*address*), in (*room number*). The hearing is being held in accordance with Section (*number*) of The School Code of (*state*) and the policies of the Board of Education of District (*number*).

At the hearing, the school administration will present information and evidence supporting the expulsion recommendation. Under the laws of the State of (*name*) and the policies of the Board of Education, your son (*or daughter*) has the right to be represented by legal counsel

As shown in the sample notice above, the notification also should set forth the student's right to a hearing and right to legal counsel, explain the expulsion procedure, and describe the charges against the student.

Where the hearing will be before a hearing officer or a committee of the board, the letter of notification should so state. The letter also should point out that the hearing officer or committee will make a written report to the board of education and that the board will make its decision based on

at the hearing and to present written and/or oral testimony rebutting the charges against him (*or her*).

Following the hearing, the Board of Education will deliberate the information and evidence presented at the hearing and then convene in a public meeting to take formal action on the expulsion recommendation. You will be notified by mail of the Board's final action.

ALTERNATIVE PARAGRAPH WHERE HEARING OFFICER IS USED:

Following the hearing, the hearing officer will prepare a written summary of the information and evidence presented and submit a report to the Board of Education within (*number*) days. The Board of Education will discuss the hearing officer's report before taking final action on the expulsion recommendation. You may be notified of the date, time and place of the Board of Education meeting and invited — at the Board's option — to appear and make a statement in behalf of your son (*or daughter*). You will be notified by mail of the Board's final action.

Both the administration and the Board of Education of District (*number*) view expulsion from school as a serious matter deserving thorough deliberation. If you have any questions or need additional information, please call (*name of appropriate administrator*) at (*telephone number*).

Sincerely yours,

(*name*)
Superintendent of Schools
School District (*number*)

the information in that report.

Essential documents

Documents that must be copied and made available for a student expulsion hearing include:

- Any written evidence that will be used to support the recommendation for expulsion;
- Pertinent portions of the student's school records.

Written evidence that should be entered into the record of a student expulsion proceeding should include, at a minimum, a copy of the rule violated by the student and any available proof that the student was aware of the rule (such as a student handbook that contains the rules). Also included would be any written statements taken from the student in connection with the alleged wrongdoing or from witnesses.

Although it probably is not essential from a legal standpoint, it is a good idea to segregate material that relates to the student's prior record of school performance and behavior. Evidence that the student was aware of the school rule and evidence that he or she broke the rule should be presented first.

Pertinent items from the student's records will no doubt vary from case to case, but should most likely include the student's disciplinary record for the current school year, copies of any incident reports filed by staff, attendance records, reports of contacts with counselors, grade transcripts, and the like. This material should be presented to the board or hearing officer after the issue of guilt has been addressed.

Naturally, documents that will be presented at the hearing should be shared with the parents of the student and their attorney. In Illinois there is no statutory obligation to offer this material to parents. However, both state and federal statutes require that parents be granted access to student records upon request and gives them the right to challenge their contents. Moreover, failure to fully inform the student and parents in advance of the charges and the nature of the supporting evidence could cast doubt on the fundamental fairness of the hearing.

Be sure that these materials are readable. If inferior copies need to be retyped, note thereon that they have been retyped. Also, plainly mark each packet "Confidential" and be careful to ensure that packets are available only to individuals who have a lawful right to see them.

The hearing room

Student disciplinary hearings should be held in locations that are both easily accessible and free from disruption or

distraction. Because confidentiality must be maintained, the room also must be secure or remote enough to ensure privacy. A school cafeteria, therefore, is not usually a good place to hold such a hearing unless it is a relatively small cafeteria with doors that close.

Physical arrangements should provide reasonable comfort for participants, of course, with adequate attention to seating, lighting, and work surfaces. Physical arrangements can say a great deal about the school board and its intentions. Seating for the student, his parents and attorney, for example, should have the same proximity to the school board as does seating for the administration. Seating can reflect an intention to provide a fair hearing, or it can convey the message that the school board (the judge) is teamed up with the administration (the prosecution) against the student (the accused).

There is no one correct way to arrange seating for a student disciplinary hearing, but the illustrations on pages 24 through 27 suggest some acceptable layouts. It is not necessary to make the hearing room resemble a courtroom. However, some of the more formal elements that are characteristic of courtrooms serve important purposes in a hearing room. Certain arrangements of tables and chairs lend themselves to good communications, for example, because they provide good eye contact and ease of hearing for all participants. These arrangements tend to give an appearance of formality and should not be discarded simply because they look overly formal.

On the other hand, it is possible to conduct a perfectly fair and legal hearing with all participants gathered around a large table, or even seated in a circle with no table at all. The advantage of seating participants at tables is that work surfaces make it easier to deal with documents entered as evidence and other printed matter. The major criteria for determining a suitable arrangement are:

- All participants should be made to feel that their presence is desired at the hearing and should be made reasonably comfortable;

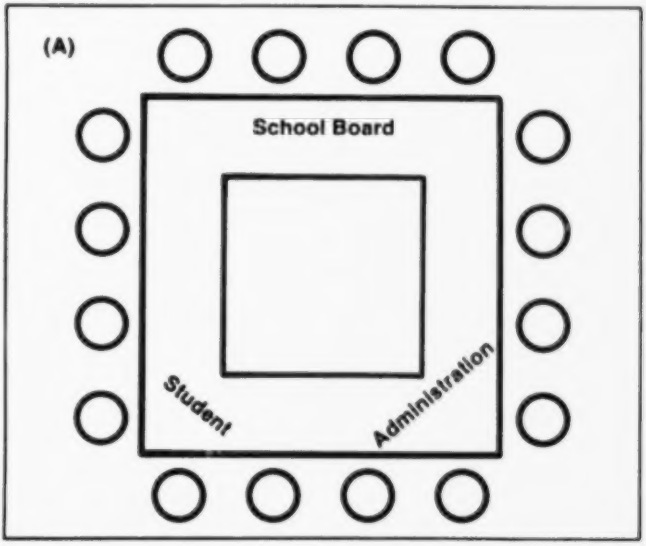
- Representatives of the administration and those of the student should be treated with equal deference;

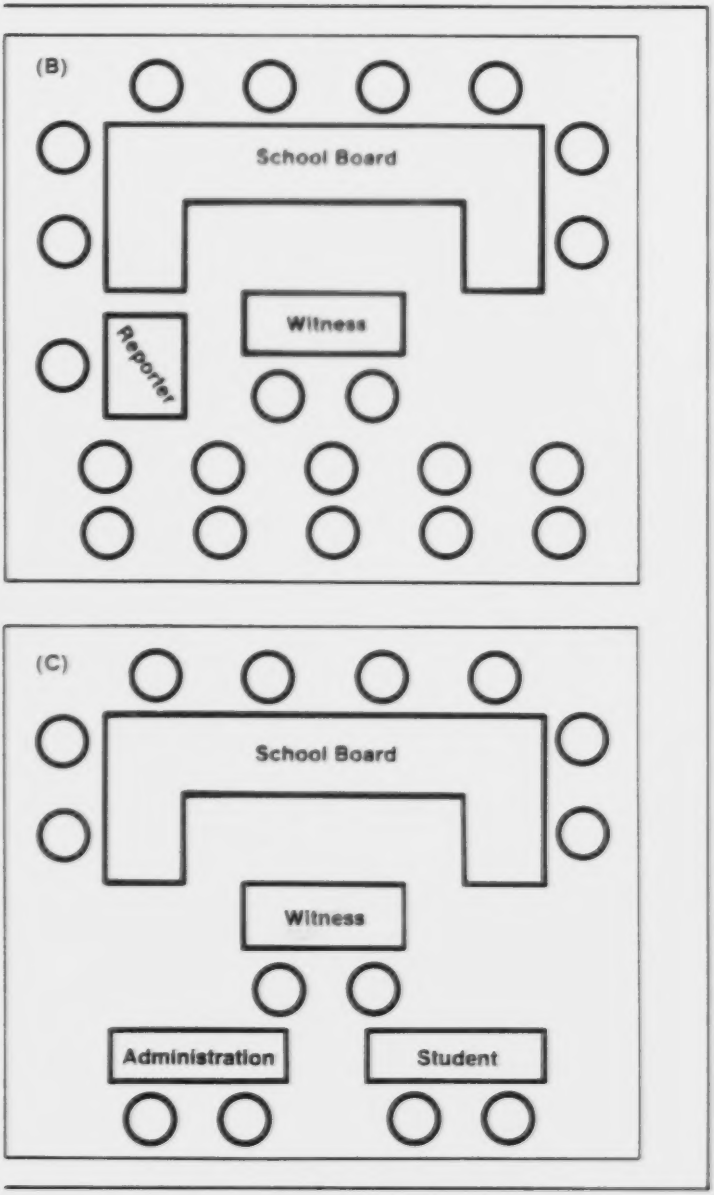
Room arrangements for hearings before the Board of Education

The arrangement below (A) inhibits eye contact between some participants, but otherwise promotes easy communication.

In (B) at upper right, representatives of the administration and those of the student sit out front until called to the witness table.

Placing school board members around a table shaped in a "U" or "V," as shown in (C) at lower right, provides each board member with good eye contact with most participants. The tables for the administration and the student can be arranged in different ways to suit available space.



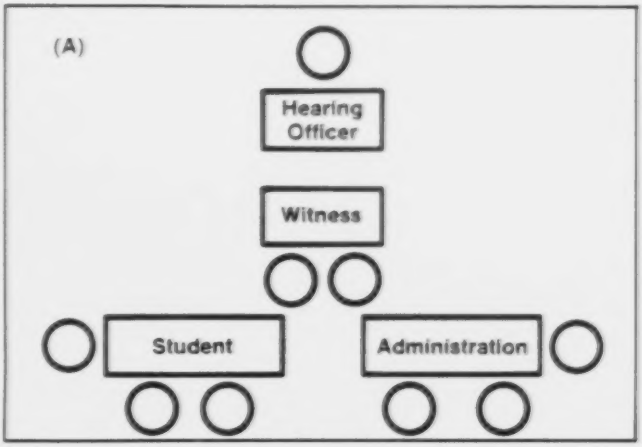

(B)
School Board
Witness
Reporter
(C)
School Board
Witness
Administration
Student

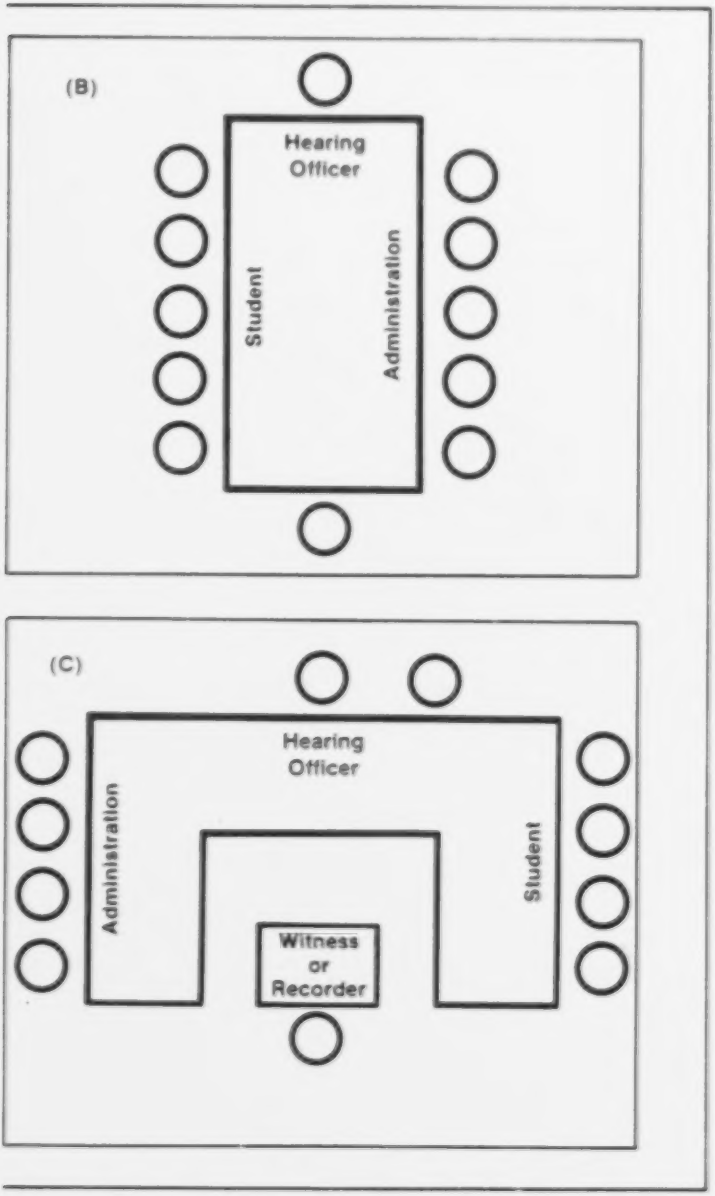
Room arrangements for hearings before a Hearing Officer

The formal arrangement in (A) below can be made less formal by eliminating the witness table and allowing witnesses to address the hearing officer from where they are seated. Another informal variation would be to retain the witness table and eliminate the larger tables, seating administration and student representatives in chairs arranged theater style.

In (B) at upper right, the chair at one end of the table (opposite the hearing officer) can be assigned to the court reporter, with participants asked to speak from where they are seated. To be somewhat more formal, the foot of the table can be used for witnesses addressing the hearing officer.

The arrangement at lower right (C) is kept informal by having witnesses testify from where they may be seated and placing the recorder at the small table. Another option is to seat the recorder next to the hearing officer and use the small table for witness testimony. This makes the arrangement more formal and creates better eye contact with witnesses.




(B)
Hearing Officer
Student
Administration
(C)
Hearing Officer
Administration
Student
Witness or Recorder

• The school board (or its hearing officer) should be able to obtain a clear grasp of the information or arguments presented by both sides.

Recording the hearing

An adequate record of the student disciplinary hearing is essential for the hearing officer to prepare a written report of the charges, arguments and evidence to the full board for review and final action. If the full board hears the case, adequate minutes are necessary to prove that the hearing was conducted properly.

In Illinois, the Open Meetings Act permits disciplinary hearings to be closed to the public. The Act also requires that minutes of a closed meeting state the time, place and purpose of the meeting, identify persons present, and generally describe anything that is proposed or discussed. When someone is designated by the board president to keep notes that will help the board when it deliberates on the evidence, those notes normally can satisfy the requirements of the Illinois law. The minutes of a disciplinary hearing, of course, would not be made public, but would be filed with confidential minutes of other closed meetings.

4/Conducting the hearing

Setting the tone

Members of the school board (or the board hearing officer) must remember that a student disciplinary hearing presents them with a *judicial* role. They must approach the hearing with impartiality, and their demeanor must reflect an intention to provide fundamental fairness. Their behavior must be above reproach. At the hearing, for example, the student and his parents should be accorded the same courtesies as are accorded the administration. They should be treated with equal formality and cordiality appropriate for the circumstances.

Formal v. informal procedures

As indicated in Chapter 1, the laws in Illinois and some other states give school officials rather wide discretion in the conduct of student disciplinary hearings. The hearing can amount to an informal exchange of information and viewpoints with the school board, administration and student seated around a table. Or it can reflect formal courtroom arrangements with the various parties seated at separate tables and with attorneys examining and cross-examining witnesses.

Most disciplinary hearings probably need to be somewhere between these two extremes — formal enough to ensure that the case against the student is fully presented and that the student has an adequate opportunity to present a rebuttal, yet not so formal that procedures require judicial expertise. The question most likely to confound the school administrator is, just where between these extremes do our hearings need to be?

The best answer is that most disciplinary hearings can be kept relatively informal, but some situations call for formal procedures. Each school district can develop its own routine

procedures for conducting disciplinary hearings, but ought to be prepared to shift into a formal mode when:

- The student has denied guilt;
- The charges against the student are potentially criminal in nature;
- The alleged infraction has become a controversial issue in the community or created public pressures on the school board;
- An attorney is representing the student.

In these special situations, the administrator should review the facts with the school attorney to determine whether a formal approach is called for. If it is, then it may be advisable to put the case in the hands of the attorney. Few administrators are trained to properly organize and present a case in a formal manner.

Determining the degree of formality called for means answering such questions as: How will evidence be presented and by whom? Who will question witnesses? What rules of evidence will be observed? In an informal hearing, the administrator can simply describe the case against the student and ask a few sworn witnesses to describe in narrative fashion what they know or what they saw.

In a formal hearing, evidence may be presented through direct examination and cross-examination of witnesses. Witnesses will be sworn and instructed to answer only the questions asked without additional comments. Moreover, judgments must be made as to the admissibility of various types of evidence. Some written documents entered into the record must be authenticated, and there may be testimony by expert witnesses. The existence of these variables suggests that not all student disciplinary hearings need to be conducted in exactly the same fashion — but when in doubt, it is probably best to lean toward the formal. Furthermore, the degree of formality called for — based on the seriousness of the charges or the extent of dispute — probably determines whether the administration should handle the case or put it in the hands of an attorney.

The order of events — an overview

The order of events should be planned so that evidence is presented and rebutted in a way that avoids confusion. The presiding officer should open the meeting by explaining the purpose of the hearing (as described more fully later in this chapter). The administration should then present its case for expulsion, explaining the reason for the expulsion recommendation and presenting evidence that the student violated a school rule.

The presiding officer should offer the student an opportunity to cross-examine each witness for the administration before that witness is discharged. The attorney for the student in a strictly formal hearing will wait until after the administration presents its case before beginning the case against expulsion. As discussed later in this chapter, the student's representative might choose any of several appropriate approaches, ranging from a total denial of guilt to an admission of guilt with a plea for forgiveness.

When the student's side of the issue has been presented, the presiding officer should then ask for closing statements, with the administration going first. The administration's closing statement might include a brief review of the infraction and the evidence. It might also include a rationale as to why expulsion is in the best interests of the school.

The student's closing statement might review evidence presented in rebuttal, as well as make an appeal for forgiveness based on the student's good school record or mitigating circumstances surrounding the infraction.

Following the closing statements, the presiding officer adjourns the hearing. If a hearing officer or committee has conducted the hearing, the next step is to prepare a written summary for the full school board. If the full board has heard the case, the board can convene in executive session to deliberate.

Following school board deliberations, the board must convene in a public meeting to take action in order to expel the student.

Opening the hearing

Regardless of whether the hearing is formal or informal,

the hearing officer or the school board president or hearing committee chairman should open the meeting by entering some key facts into the record. The following statement is an example:

> "Let the record show that this is a student disciplinary hearing held on (*date, time and place*) pursuant to the laws of the State of (*name*), before (*name of hearing officer, Board of Education, or committee*) of School District (*number*), (*county and state*). This hearing is being held to hear information and evidence regarding the recommended expulsion (*or challenging the suspension*) of (*student's name*) from School District (*number*) for the period beginning (*date*) and ending (*date*)."

Other information that the presiding officer should recite for the record includes:

- Identification of all persons present;
- Overview of the due process function of the hearing and the procedures that will be followed.

In identifying persons participating in the hearing, the presiding officer should indicate whether the student is present and whether he or she is accompanied by his parents and/or an attorney. He also should indicate who is presenting the case for expulsion on behalf of the administration and whether that individual is represented by legal counsel. Finally, he should identify members of the board (or board committee), the school board attorney, the court reporter, and any witnesses present.

In describing the purpose of the hearing, the presiding officer might say something to this effect:

> "A student can be expelled from school only by formal action of the Board of Education. Before the Board can decide whether (*student's name*) has, in fact, violated the school's disciplinary rules, it must hear the evidence. This hearing is designed to protect the student's due process rights during the presentation of that evidence."

Procedures will vary, of course, depending upon whether the hearing is formal or informal or whether it is before a hearing officer or a committee or before the full board. The description of the procedures should reflect these differences. A hearing officer might describe procedures as follows:

"To begin these proceedings, (*name of individual representing administration*) will summarize the charges against (*name of student*). He will then present information and evidence supporting those charges in the form of written documents and the testimony of witnesses. The student and his parents (*or their attorney*) will be given an opportunity to cross-examine any witnesses presented by the administration and to challenge any of the written evidence entered.

"Following the presentation of the administration's case for expulsion, the student and his parents (*or their attorney*) will have an opportunity to make a case against expulsion. They may present evidence of their own, oral or written, and may call witnesses to testify. This evidence may be challenged by the administration.

"Both the administration and the student will be given an opportunity to make closing statements if they wish.

"No decision regarding the recommended expulsion will be made today. As hearing officer, it is my responsibility to prepare a written report of the information and evidence presented both by the administration and in behalf of the student. My report will be presented to the Board of Education for review and formal action at a later date. The Board will make its decision based on my report and its discussion of it in executive session.

"The executive session of the Board is tentatively scheduled for (*date, time and place*), and it will be followed immediately by a public meeting at which time the Board will take formal action on the expulsion recommendation. All parties will be notified of the final decision."

Where the hearing is being held before the full school board, final paragraphs of the above would be different:

"Following closing statements, the Board will convene by itself to deliberate. In deliberating, we first will consider the validity of the charges against the student. If the Board believes that the student is, in fact, guilty of the charges, it will then weigh the proposed penalty. That is, is expulsion the appropriate punishment? In the first phase of our deliberations, we will examine evidence surrounding the incident or alleged infraction. In the second phase, we may look at the student's past record of school performance and hear the recommendation of the Superintendent of Schools as to the appropriate educational response to the infraction.

"Finally, the Board will convene in a public meeting and take a formal vote on the administration's recom-

mendation to expel.

"All interested parties are invited to attend the public meeting. The parents and student will be notified by mail of the Board's final decision."

These opening statements regarding procedures provide a road map for participants who have not been through a disciplinary hearing before and reassure the parents and student, in particular, that there will be proper regard for due process rights. Explaining how the hearing is going to be conducted also instills confidence in the school board or hearing officer.

Presenting the case for expulsion

Once the presiding officer has set the stage for the hearing, he should call on the administration to present the case for expulsion. In an informal situation, the administrator who is bringing the expulsion recommendation may be introduced and asked to present the evidence in narrative form and the reasons for his recommendation.

In a formal setting, it is more appropriate to have someone function as the "conductor" of the administration's case. This person introduces witnesses, has them sworn in, and elicits evidence from them through a question-and-answer format. Where the administration has employed an attorney, the attorney would conduct the case. Where an attorney is not employed, this role may be filled by the superintendent or some other administrator who is not going to present evidence as a witness.

For the record — Whether the hearing is formal or informal, the administration's first step should be to present certain essential information and see that it is entered into the record. This information should include:

- The specific school board policy or school regulation that the student has allegedly violated. A copy of the policy and the student discipline handbook should be introduced, along with any oral or written evidence showing that the student and his parents knew of the disciplinary rule prior to the alleged incident or misbehavior. (Two rules of "due process" are that (a) there must be a rule and (b) the student

must have been made aware of the rule — unless the infraction is so gross as to violate common standards of conduct.)

• Documentation showing that pertinent laws and due process requirements have been met up to the time of the hearing. Documents would include copies of official notices sent to the student and parents, informing them of the hearing and of their legal rights, and any receipts showing that the notices had been received. The administration also should indicate whether the charges were evaluated by appropriate specialists and found to be unrelated to any handicapping condition. Any related documentation should be entered into the record.

If the administration fails to offer the above information, the presiding officer should ask for it. If the school board's attorney is on hand, he should examine documents entered as exhibits to determine whether they meet minimum legal standards. The school board, as well as the administration, has a stake in the legal sufficiency of the hearing.

Stating the charges — To begin building the case for expulsion, the administration must first describe the incident or misconduct allegedly engaged in by the student. The complaining administrator would present this explanation at the request of the presiding officer in an informal setting. In a formal setting, the complaining administrator would be presented and questioned by his attorney or by another administrator.

The student's past record — The school board should evaluate the evidence regarding guilt on its own merits. Therefore, where the student has denied guilt or where there may be disagreement as to the seriousness of the student's conduct, the administration should bring up the student's past record after testimony on the charges has been heard. However, a recommendation to expel is sometimes based on a series of infractions over a long time rather than on a single infraction. That is, school rules may provide that a third or fourth infraction — such as swearing or smoking on school grounds — is punishable by expulsion. Where the student is recommended for expulsion for being caught smoking on school grounds for the fourth time, the three

earlier infractions would have to be discussed as part of the administration's case for expulsion.

Moreover, an expulsion recommendation may be based on the student's total record of misconduct during the current school term. The record would probably involve a variety of infractions of different types, none of which by itself may be punishable by expulsion. In such a case, the administration will depict a student who has proved himself unable to function acceptably in any of the settings available through the school district, including alternative education programs. To do that, the administration will need to describe the student's total record of performance, present documents supporting that record, and possibly present teachers and counselors who can shed light on the student's behavior. The administration also should document all efforts that have been made to help the student develop acceptable behavior.

What the administration should *not* do, in any case, is to paint the student as a bad or undesirable person in an effort to influence the school board's decision as to whether the student did or did not commit a particular infraction.

Keep in mind that, if the student has a favorable prior record, he or his attorney probably will bring that out during the hearing. The student's record — good or bad — will no doubt be a factor in the board's final decision regarding expulsion. However, the board should not allow that record to be a signficiant factor in determining whether the student is guilty of a particular deed.

It is suggested, therefore, that the administration's case for expulsion should focus on the infraction(s). That is, the administration should describe the nature and relative seriousness of the infraction and present evidence that the accused student is the guilty party. If deemed appropriate, the student's past record of school performance and conduct can be presented later in closing arguments. Or the student's disciplinary record may be presented to the school board after it adjourns to executive session to deliberate. In some cases, where the student is found guilty of some particularly gross infraction, his past record may be inconsequential.

Presenting and swearing witnesses

Any witness appearing before the hearing officer or school

board in a formal hearing, including administrators who are presenting evidence, should be sworn to tell the truth. A court reporter, who is a certified official of the courts, may be assigned to swear in witnesses. If a court reporter is not on hand, the presiding officer should administer the witnesses' oath.

The administrator or attorney conducting the case for expulsion for the administration would then call witnesses to present evidence supporting the contention that the student is, indeed, guilty of the alleged infraction. As indicated earlier, witnesses in an informal setting may simply be asked to tell what they know. In a formal approach, they would be asked to respond only to specific questions.

The presiding officer should give the student or his representative an opportunity to question each witness in turn as presented by the administration. Moreover, there appears to be no reason why the hearing officer (or members of the hearing board) should not seek clarification by asking questions of witnesses presented by either side. Of course, their questions must be carefully stated to avoid the appearance of bias toward either the administration or the student. Therefore, it is a good idea to funnel all questions from board members to the presiding officer so only one person asks questions of witnesses.

Hearing the student's side

Once the administration has completed its case for establishing guilt, the student must be allowed to rebut the charges and/or present evidence in his own behalf. Obviously, there are several options open to the student, including these:

- He may remain completely silent — in which case the board can only base its decision on information presented by the administration. It is not necessary for the student to present any evidence for a proper due process hearing; it is necessary only that the student have an *opportunity* to present evidence.
- He may deny guilt without presenting evidence.
- He may deny guilt and present witnesses and other evi-

dence to support his case.

• He may admit guilt — expressly or by implication — and attack instead the appropriateness of expulsion as the proposed punishment. For example, the student may contend that the school rule is unclear or describe mitigating circumstances surrounding the infraction.

Challenging the allegations — If the student and his parents disagree with the administration's charges, they must be allowed to rebut them in an orderly but thorough manner. The student should be allowed to speak for himself (under oath if the hearing is formal), to call other witnesses, and to present other evidence in an effort to refute the administration's allegations. Denial of guilt can take various forms, of course. The student may contend that he was not involved at all, for example, or that he was merely a follower and not a ringleader. Moreover, the student's attorney may call various school officials to the witness stand, including the administrator who is recommending expulsion, in an effort to dispute the evidence against the student, to bring out the student's exemplary school history, or even to show that the administrator bears a grudge against the student. Of course, just as the student was allowed to question the administration's witnesses, the administration should be allowed to question any witnesses appearing on behalf of the student, including the student himself.

No defense — The student and his parents may choose not to challenge the administration's charges. They may admit guilt or say nothing at all. Even admitting guilt, however, they may choose to question the expulsion recommendation as being too severe or unfair or bring up mitigating circumstances. In a strictly formal proceeding, the presiding officer may ask the student's representatives to wait until the closing statement to bring out these latter concerns. In an informal setting, there is no sharp distinction between the presentation of charges and evidence and the closing statements. In a formal hearing, however, it may be helpful to make this distinction so that the student's side can be given "the last word" before the board adjourns to deliberate.

If it is clear that the student and his parents do not wish to address the question of the student's guilt, then the presiding

officer might ask the administration to make its closing statement. A question directed to the student might clarify the situation:

> "So as to expedite this hearing on the question of guilt, do you wish to challenge the administration's contention that you committed (*describe the infraction*)? You are free to deny this contention and to present any evidence you wish in your defense. If you do not challenge this contention, we shall ask the administration to complete its case with a closing statement, including its recommendation for appropriate punishment. We would then give you an opportunity to make a final statement, including anything you might wish to say about the proposed expulsion."

Request for dismissal — The student's attorney may decide that the evidence presented by the administration is not strong enough to meet the burden of proof necessary to sustain expulsion (i.e., a preponderance of the evidence). In that case, the attorney may ask the board to dismiss the charges even before launching a defense for the student.

If the student's attorney enters a motion for an immediate dismissal of the charges, the presiding officer should respond: "We will take your motion under advisement and consider it when we consider all of the evidence presented at this hearing." The student's attorney then has a choice of (a) presenting evidence in the student's behalf or (b) declining to present evidence and resting entirely on his motion for dismissal.

If the student's attorney decides not to present evidence, the presiding officer should thank the attorney for his cooperation and then ask the administration whether it has anything to add by way of a closing statement before the board adjourns to deliberate the case.

Closing statements

When both sides have made their cases (or had an opportunity to do so), the presiding officer should invite first the administration and then the student to make closing statements. In fact, closing statements should be encouraged. Because a closing statement is a summary of what has already been presented, it can help board members piece key

facts together or help the hearing officer organize his thoughts prior to writing a report for the board.

The administration also may wish to introduce broader arguments in favor of expulsion during the closing statement, possibly introducing information from the student's prior record.

The closing statement gives the student an opportunity to cite extenuating circumstances, question the severity of the proposed punishment, present evidence as to his good character, and otherwise plead a case for remaining in school. In addition to reviewing facts (and conflicting facts), the closing statement will probably involve emotional appeals.

Deliberation and decision

In most states, including Illinois, the school board will adjourn the hearing and meet by itself to deliberate. The members of the board will either have heard arguments first-hand or will have studied the hearing officer's written report.

A question that frequently arises is, who should take part in the board's deliberations? The board may want to have its attorney on hand to provide legal advice. Or the board may want the district superintendent to provide guidance, particularly regarding the appropriate punishment. However, the administrators who made the case for expulsion should not be included during the board's deliberations regarding guilt.

In its deliberations, the school board should first address the question of guilt before going on to the issue of punishment. This sequence is advisable even following an informal hearing, if the question of expulsion hinges on the question of who committed a specific infraction. Where guilt is not in dispute, of course, the board has only to weigh the appropriateness of expulsion as a punishment.

Note that guilt is not always a yes or no proposition. The student may deny that he was involved in the alleged incident at all, of course. But he also might argue that the administration has distorted or exaggerated the facts or that the incident occurred in a different way from what the administration has claimed. Thus, the board may ultimately decide

that the student is guilty of an infraction that is slightly different from the one alleged by the administration, and that infraction may or may not be punishable by expulsion. Although either hearing party may grope for the truth in arriving at a verdict of innocent or guilty, the school board is not an investigative body. That is the administration's function, and the board should limit itself to examining the evidence, keeping in mind that the burden is on the administration to prove its case by "a preponderance of the evidence."

If after discussing the evidence there is consensus among members of the school board that the student is not guilty, the board should convene in public session and vote down a motion to expel.

On the other hand, if board members believe the student did indeed commit the alleged infraction, then the superintendent may be asked for his recommendation regarding punishment. If appropriate, the student's past record may be considered at this point also.

The two-part hearing — As discussed in Chapter 2 (under "Board of Education") a school board may choose to address the issue of punishment in a separate hearing. This means that the board would reconvene the hearing after a finding of guilt to allow both the administration and the student to present information regarding the appropriateness of expulsion. This second hearing would occur after the board has deliberated and reached a consensus that the student is guilty of the charges alleged by the administration. Note that this bifurcated approach has not been required by any court as of this writing. Under current law, the authors believe that giving the student an opportunity to rebut the administration's allegations and an opportunity to make a closing statement will provide satisfactory due process protections. Where bifurcation is called for, the school board can provide the necessary protections during its subsequent deliberations by addressing the question of guilt before considering the student's past record.

The hearing officer — The same procedures should be followed where the hearing is before a hearing officer as if it were before the full school board. The hearing officer should structure his report in a way that enables the school board to

deal first with the nature of the infraction and the question of the student's guilt. If the student has denied guilt or disagreed with the nature of the infraction as described by the adminstration, the school board may deliberate first on the issue of guilt and then request additional information and recommendations from the superintendent.

Formal action

In Illinois and most other states, a student can be expelled only by a formal vote of the school board at a public meeting. Once the school board has deliberated the evidence and the arguments in executive session, it must convene at a public meeting to take formal action on a motion or resolution to expel.

If a majority of the board votes not to expel, the student's record should be expunged and he should be given an opportunity to make up any school work or tests that he might have missed. If the board majority votes for expulsion, then the student must be so notified as discussed later.

A question often arises as to whether the student's name should be used in the public meeting. The statutes in Illinois and many other states do not provide the answer to this question. Many school boards make it a practice to protect the student's privacy by referring to a code number or to "the student discussed in closed session." This practice has not been challenged to date and probably will not be. It is in the student's best interests to follow such a practice, so the student isn't likely to question it. However, in some more sensational cases, the public or the news media may object to not hearing the student named in the board resolution to expel. Moreover, many attorneys in Illinois believe there is no legal basis for referring to the student in any way other than by name. In other words, the practice of referring to the student by a code number or other euphemism is probably not legally defensible. On the other hand, the practice does not appear to violate any right of the student and is unlikely to become a basis for overturning the expulsion through litigation.

The school board should be guided by the advice of its attorney in deciding whether to mention the student's name in public, so that its practice can reflect any changes in law.

Decision and notification

In Illinois and most other states, the school board is under no legal obligation to issue a written decision in student disciplinary cases. Where there is no such requirement placed on school boards, most attorneys recommend that the board not issue a written decision. Where a written decision is required, or appears to be advisable in special circumstances, the decision should be drafted in consultation with the board's attorney.

However, the board is required to notify the student and parents of its decision — even though these people may be in attendance at the meeting when the school board votes on the expulsion motion. As shown in the sample letter below, the letter should be from the board of education and, among other things, should set forth the beginning and ending dates of the expulsion period.

Sample notice of expulsion

(*Date*)

Dear (*parents*):

After carefully weighing the information and evidence presented to it, the Board of Education of District (*number*) at its meeting on (*date*) voted to expel your son (*or daughter*), (*student's name*), from school for the period beginning (*date*) until (*date*). During this period (*student's name*) is not to attend classes or be involved in any school activities in School District (*number*).

(*Student's name*) may call the school office at (*telephone number*) to arrange a date to return books and other school-owned materials, as well as to pick up any personal effects remaining at school. After the expulsion period ends on (*date*), (*student's name*) may enroll in summer school or otherwise return to a full school program. Arrangements should be made early with the school.

Both the administration and the Board of Education regret that this action had to be taken.

Sincerely yours,

(*name*)
Secretary, Board of Education
School District (*number*)

The official record

In Illinois, as in most states, a school board's decision to expel a student is not subject to review by the courts unless the student brings charges against the board for violation of his substantive or procedural due process rights. Therefore, a very small percentage of such cases go to court. However, it is advisable to prepare for such a possibility by organizing an accurate and complete record of all proceedings.

As indicated earlier, it is not necessary to have a court reporter's record. It is advisable to have at least an informal record, including supporting documents. All of the documentation entered into the record and copies of any official meeting minutes should be located where they (a) will remain confidential in accordance with laws regulating student records, and (b) can be readily gathered together by authorized personnel if and when they are needed.

State laws vary as to what material can be placed in the student's file. Under the federal Family Educational Rights and Privacy Act, all information about the student must be placed in the student's file. The school board minutes should make reference to any evidence or related information filed elsewhere in the event such evidence needs to be located. In Illinois, for example, the school board is required to keep minutes of closed meetings. Even though those minutes may never be made public, it is advisable to incorporate the student's confidential file by reference rather than keep student-related documents with the minutes.

5/Some related questions

Should the presiding officer deny the admission of hearsay evidence or follow other strict rules of evidence?

The courts to date have not required school boards to observe the strict rules of evidence that would prevail in a criminal proceeding. There have been instances, however, where uncorroborated hearsay evidence has been thrown out. The best advice is: Don't base an expulsion recommendation on uncorroborated hearsay evidence. Second-hand information may be useful if it supports first-hand information or eyewitness accounts.

It would be helpful, in formal situations, to have an attorney review questions regarding rules of evidence. Much depends upon the circumstances.

Should the administration use students as witnesses in presenting a case for expulsion?

If testifying presents no hardship or danger to the students or no problems of peer pressure, there is no reason why they should not be asked to testify. Note, however, that they cannot be forced to testify; the school board has no subpoena powers.

Also note that credibility will be a problem, particularly with younger students. The administration must judge each situation on its own merits, but it is generally advisable to rely on students only to corroborate adult testimony. Unless a student witness is highly mature, don't build a case exclusively on one student's testimony if it can be avoided.

Can we require a student to testify at his own expulsion hearing?

Because the board does not have subpoena powers and cannot require a student to even attend his own expulsion hearing, the real question is whether the board can treat refusal to testify as an admission of culpability. The general

answer is, maybe! If the alleged conduct is, or may become, an issue before a criminal court, the student may invoke the Fifth Amendment to the U.S. Constitution, which protects the individual from being forced to testify against himself.

No adverse inference should be drawn against a student who invokes the Fifth Amendment if it can be shown that his testimony can be used against him in a criminal proceeding. However, it may be possible for the student to suppress his hearing testimony during subsequent criminal proceedings. If that is the case, the school board may rightfully expect the student to testify at the disciplinary hearing. However, when a student invokes the Fifth Amendment or refuses to testify for whatever reason, the school board should consult its attorney before deciding how to treat the problem.

How should the administration deal with contraband involved in an expulsion case?

Here is another question calling for local guidance from your attorney. Laws regarding contraband vary among different jurisdictions. Where illegal drugs or weapons are involved, for example, it may even be illegal in some places for administrators to keep them in their possession, even though they are part of the evidence against the student. In any case, you will need the cooperation of your local law enforcement agency, because illegal contraband will probably be involved in a criminal proceeding. Leaving such material in the hands of administrators could make the material inadmissible as evidence in a criminal proceeding.

Where the law permits a student disciplinary hearing to be held at a meeting closed to the public, should we honor the parents' request to open the meeting to the public?

Although there appears to be no compelling legal right of parents to demand an open hearing, different attorneys may give different advice on this question. After all, the meeting is closed for the student's benefit; if he wants it open, what can be the harm? Other attorneys will contend, however, that the student and parents may not choose what is best for the student in this instance — or at least a court might hold to that effect. Any harm befalling the student through a

public hearing, such as damage to his reputation, might then be placed at the board's doorstep. Therefore, there is no reason to grant a request to open up the hearing.

Again, when in doubt, consult your attorney.

Appendix

Some pertinent case law

BY ALLEN D. SCHWARTZ

This summary of pertinent case law is an excerpt from Chapter 14, "Board Authority Over Pupils," in the 1985 edition of Illinois School Law. *It is reprinted here with permission of the author, Allen D. Schwartz, and the publisher, the Illinois Institute for Continuing Legal Education.*

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Procedural due process

Due process has procedural and substantive aspects. Procedural due process is the method by which a person establishes, defends or asserts rights, most often in a judicial or quasijudicial hearing. Substantive due process will be subsequently discussed. Procedural due process does not have a fixed meaning. In *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 95 L.Ed. 817, 849 (1951), the Court stated, "Due process is not a mechanical instrument. It is not a yardstick. It is a process." Due process is that which comports with the deepest notions of what is fair and what is right and what is just, held *Palko v. Connecticut*, 302 U.S. 319, 82 L.Ed. 288 (1937). In *Mathews v. Eldridge*, 424 U.S. 319, 47 L.Ed.2d 18 (1976), the Court stated:

> **. . . identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.** [Citation omitted.]

The recognition of students' constitutional rights to procedural due process has led the courts to a review of school boards' disciplinary tools, particularly of suspension and expulsion. The landmark case of *Dixon v. Alabama State Board of Education*, 294 F.2d 150, 155 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961), set the mode for this disciplinary review. *Dixon*, in reviewing an expulsion case, said:

> **Whenever a governmental body acts so as to injure an individual, the Constitution requires that the act be consonant with due process of law.**

Prediscipline hearing

Goss v. Lopez, 419 U.S. 565, 42 L.Ed.2d 725 (1975), set out the procedural standard that must be followed before discipline is imposed. It held that access to the knowledge and skills imparted by a public school education was a property right and that a suspension could infringe upon a student's liberty interest. Any impairment of these property and liberty interests requires rudimentary procedural due process to be afforded the student. Before discipline is imposed: (a) before suspension, there must be informal discussion between the disciplinarian and the student regarding the alleged misconduct; (b) during that informal meeting, the disciplinarian must discuss with the student the basis for the proposed discipline; (c) the student must be given the opportunity to respond to the information presented.

If there is an immediate danger to students, persons or property, the student may be summarily removed from the school, but a presuspension discussion must then be scheduled as soon as is practicable. *Goss* also required that if the preliminary discussion indicates a more formal and extended discussion is required before the suspension is imposed, such greater process should be given to the student. The requirement of greater process has been generally ignored, with school districts usually providing a formal hearing after or during the suspension if requested for a suspension or expulsion.

Substantive due process

Substantive due process is the requirement that the rules

should be reasonably defined, fairly administered and reasonably related to a valid purpose. Substantive due process refers to the why; procedural due process refers to the how. In *Wood v. Strickland*, 420 U.S. 308, 43 L.Ed.2d 214, 216 (1975), the Court held that, "Public high school students have substantive and procedural [due process] rights while at school."

Disciplinary rules

The Illinois School Code (*Ill. Rev. Stat.*, c. 122, par. 10-22.6), authorizes the suspension and expulsion of students who are guilty of gross disobedience or gross misconduct. These statutory provisions are the general standards. The school board must also frame specific reasons for discipline in order to meet the requirements of substantive due process. The board has authority to do so under the School Code, §10-20.5, which is its rule-making authority.

School boards must promulgate disciplinary rules so worded that the student is informed of what conduct will lead to discipline. Substantive due process, however, does not require school officials to describe every type of conduct in which mischievous students might engage or for which discipline might be imposed. That would be impossible. The rules need not be written with the specificity of criminal rules. Thus, *Coffman v. Kuehler*, 409 F.Supp. 546 (N.D. Tex. 1976), upheld rules providing discipline for disrespect, loitering and rowdy behavior as not unconstitutionally vague. In *Richards v. Thurston*, 424 F.2d 1281, 1282 (1st Cir. 1970), the court said:

> **. . . we would not wish to see school officials unable to take appropriate action in facing a problem of discipline or distraction simply because there was no preexisting rule on the books.**

In addition to specific rules, the board may have a general catch-all rule, such as one covering all other conduct which substantially and materially disrupts the school system as the grounds for discipline.

Elements of a valid disciplinary hearing

Adequate notice

Notice of the hearing must be given a sufficient time prior

to the hearing to enable the student to prepare a defense. *Linwood v. Board of Education (Peoria School District 150)*, 463 F.2d 763 (7th Cir. 1972), approved a notice of hearing received five days before the proceeding. If the parents refuse to accept the notification by not accepting a letter of notification, they cannot argue lack of notice. *Wright v. Texas Southern University*, 392 F.2d 728 (5th Cir. 1968).

Statement of charges

The notice must (a) inform the student of the specific acts of misconduct charged and (b) inform the parents that an opportunity to present written and oral testimony to rebut that evidence will be afforded the student.

Notification of right to representation

Under the School Code, §10-22.6, the notice to the parents of an expulsion hearing must be sent by registered or certified mail, stating the time, place and purpose of the hearing, and informing the parents of the student's right to be represented by counsel.

An orderly hearing

An orderly hearing is a proceeding before an impartial tribunal in which the school board presents its case by written evidence or by witnesses, there is cross-examination of the evidence presented and the student is allowed to present evidence. The hearing may, but need not, be recorded. The school board has been held to be an impartial hearing body. See *Goss v. Lopez*, 419 U.S. 565, 42 L.Ed.2d 725 (1975), and *Linwood v. Board of Education (Peoria School District 150)*, 463 F.2d 763 (7th Cir. 1972).

Additional hearing issues

Written findings

No cases have required the decision makers to state their findings in writing or to indicate the evidence relied upon. See *Goss v. Lopez*, 419 U.S. 565, 42 L.Ed.2d 725 (1975).

Joint hearings

A joint hearing of several students was held permissible in *Buttny v. Smiley*, 281 F. Supp. 280 (D. Colo. 1968). In that case, the hearing concerned the expulsion of 65 students who

had locked arms together to deny access of university officials to a university building.

Evidentiary rules

Testimony in discipline hearings is not generally subject to the rules of evidence. Hearsay, incompetent or irrelevant evidence is admissible, provided the evidence is substantial. *Whitfield v. Simpson*, 312 F.Supp. 889 (E.D.Ill. 1970). *See Tasby v. Estes*, 643 F.2d 1103 (5th Cir. 1981).

Use of prior school record

A prior record of the student's improper conduct in the school, though not related to the incident in question, is generally admissible in school disciplinary proceedings. In *Pierce v. School Committee of New Bedford*, 322 F. Supp. 957 (D. Mass. 1971), the court permitted the school to introduce in evidence during an expulsion hearing the student's prior high school record, including 13 previous detentions.

Fifth Amendment concerns

Questions about the student's Fifth Amendment privilege against self-incrimination may arise at a disciplinary hearing when the student is also involved in a concurrent criminal proceeding. In *Caldwell v. Cannady*, 340 F. Supp. 835 (N.D. Tex. 1972), the court held a student has a right to remain silent and not testify at his expulsion hearing on the claim of possible self-incrimination when there is a pending criminal proceeding. A different conclusion was reached when the court held that the student has the right to suppress the incriminating evidence divulged in the disciplinary proceedings in any subsequent criminal proceeding.

In *Garrity v. New Jersey*, 385 U.S. 493, 17 L.Ed.2d 562 (1967), the Court held that evidence discovered during an attorney general's investigative hearing could be suppressed in a subsequent criminal trial arising from the same investigation. In *Furutani v. Ewigleben*, 297 F.Supp. 1163 (N.D.Cal. 1969), the court found that under the reasoning of *Garrity* a student could not enjoin his expulsion hearing or remain silent during it because any incriminating statements he made could be suppressed in the criminal proceedings. *See also Nzuve v. Castleton State College*, 133 Vt. 225, 335 A.2d 321 (1975).

A somewhat different twist on the issue occurred in *Gabrilowitz v. Newman*, 582 F.2d 100 (1st Cir. 1978). In that case, the university rule on disciplinary hearings was that the hearing body could not draw any adverse inference from the silence of the student at a disciplinary hearing. With this rule in mind, the court held that, because of the university rule, any testimony during the hearing was entirely voluntary and admissible at any criminal proceeding. The court found that, if the student's testimony had been compelled at the disciplinary hearing, his testimony would no longer be voluntary, and he could rely upon the rule of *Garrity v. New Jersey* to suppress that testimony during a subsequent criminal trial.

If there are no pending criminal proceedings, there would appear to be no Fifth Amendment issue, and a school may require a student to testify unless it has a rule, as in the *Gabrilowitz* case, allowing the student not to testify. See *Goldberg v. Regents of the University of California*, 248 Cal.App.2d 867, 57 Cal.Rptr. 463 (1967).

Nondispositive hearings

A meeting or hearing which does not affect a student's rights is not subject to due process. *Hannah v. Larche*, 363 U.S. 420, 4 L.Ed.2d 1307 (1960). In *Baker v. Hardway*, 283 F.Supp. 228 (S.D.W.Va. 1968), a hearing before a student disciplinary committee which did not have dispositive powers and could make only a recommendation was held not to be a hearing requiring procedural safeguards. In *Madera v. Board of Education, City of New York*, 386 F.2d 778 (2d Cir. 1967), the court construed a hearing to be a counseling meeting and, since no direct punishment or consequences could result from the hearing, no due process was required.

Review of disciplinary proceedings

The Illinois School Code does not provide for administrative review of the school board's disciplinary decisions. State court review may be had under the common law writ of certiorari. See 1 I.L.P. *Administrative Law and Procedure*, §42. Most often, review of disciplinary proceedings occurs when litigation is initiated on a civil rights claim challenging the disciplinary proceedings on constitutional grounds.

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